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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 481

VIKING THEATRE CORPORATION, *Petitioner,*

v.

PARAMOUNT FILM DISTRIBUTING CORPORATION, *et al.*, *Respondents*

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

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1. The respondents open their opposition to the petition for certiorari with the argument that the *per se* issue was specifically abandoned in the pre-trial order filed February 26, 1960. On this basis, they charge the petitioner with trying his case on one theory, and, having lost that, appealing on another. This is a calculated misrepresentation to the Court of the issues raised and passed on by the two lower courts in this case.

Petitioner's original trial counsel, Mr. Kohn, signed the fourth pre-trial order on February 26, 1960. In

October 1960, on the eve of trial, the respondents, as their first strategic move, charged Mr. Kohn with a conflict of interest on the ground that he also represented a corporation controlled by respondent Goldman in another and unrelated anti-trust matter, a fact they had known for many months. Under the pressure of the respondents' charge and the trial judge's concern, Mr. Kohn withdrew from the case after having made his opening statement. A mistrial was declared, and new counsel, Mr. Henry W. Sawyer, was retained and given until May 15, 1961, to prepare for a new trial. Mr. Sawyer sought to raise once again the *per se* issue. The trial judge not only overruled the lengthy objection of Mr. Nizer, holding that new counsel was not bound by the legal theories of his predecessor, but specifically instructed Mr. Sawyer to file a brief on the *per se* issue because of its importance to the case. R. 2741-43 (Appellant's Supplemental Appendix in the Court of Appeals). On appeal, again over the objection of Mr. Nizer, the Court of Appeals treated and rejected the petitioner's *per se* arguments on the merits. While the respondents may disagree with the re-opening of the pre-trial order, it is a misrepresentation to say that the *per se* issue was not reinserted in the case. Both at trial and on appeal, the *per se* issue has been basic to the petitioner's position. As petitioner's counsel argued in the trial court, "my theory is and has been from the very beginning that as operating here it [the split] is illegal *per se*." R. 2742.

2. The respondents argue that the split system is not analogous to the division-of-the-market cases because no exhibitors were excluded from any part of the market for product. The respondents have simply failed

to keep their arguments straight. In a division of the market by *sellers*, no non-participating seller is excluded from the market, but the alternatives of *buyers* are curtailed since the splitting sellers compete in only part of the market. In a division of the market by *buyers*, no non-participating buyer is excluded from the market, but the alternatives of *sellers* are curtailed. In the present case, it is undisputed that the alternatives of the distributors in licensing films were curtailed. For films on the split list, a distributor could solicit the bids of either Goldman or Stanley Warner, but never both; either 35.7% (Goldman and Fox) or 60.8% (Stanley Warner and Fox) of the available seating was foreclosed to the distributor depending on which side of the split the film was on. See Chart, Petition, p. 5. It was this foreclosure of available seating that eliminated competition between the respondent-exhibitors and gave them monopoly bargaining power over the films on their respective splits. The petitioner does not claim, and never has, that it was excluded from any part of the first-run theater market, but rather that it was discriminated against within that market.

Other than this one insubstantial argument, the respondents make no attempt to distinguish or rebut the petitioner's legal arguments on the *per se* issue.

3. The respondents make no attempt to buttress the Court of Appeals' anomalous conclusion that three parties are insufficient to constitute a conspiracy. They adopt the court's conclusion that even if Paramount did agree with Goldman and Stanley Warner to grant them exclusive negotiating rights after the rejection of all other bids in accord with the Schwalberg agreement, no conspiracy was shown since only one distrib-

utor took part. However, a horizontal conspiracy between two or more distributors is not required to establish an anti-trust violation. If one distributor and two exhibitors conspire to restrain the trade of that distributor's product, a *prima facie* anti-trust violation is shown. As was said in *Brodonaro Bros. Theatres, Inc.* v. *Paramount Theatres, Inc.*, 176 F.2d 594, 598 (2d Cir. 1949), "even a single vertical conspiracy between Paramount, as a distributor, and Warner, as an exhibitor, would scarcely be outside the scope of the pleadings and proof." Accord, *Fox West Coast Theatres Corp.* v. *Paradise Theatre Bldg. Corp.*, 264 F.2d 602, 605 (9th Cir. 1958).

4. The respondents place considerable reliance on the Court of Appeals' conclusion that there is no evidence to support the petitioner's allegations of discrimination. The discussion by the court, however, is not convincing and is not substantiated by the record as an analysis of several of its rulings will show.

Midway in the trial, the trial court set aside time for argument on whether it should reconsider its earlier ruling limiting the petitioner's evidence to the 87 films in which it expressed an interest. R. 1039. Petitioner's counsel described in an oral offer a number of evidentiary comparisons which went beyond the 87 films; one of these was discrimination in rental adjustments between the petitioner and the respondent-exhibitors. At the conclusion of argument, the trial court held that the earlier ruling would apply to this and other offered comparisons. R. 1053-54. The Court of Appeals avoided this important evidentiary issue and affirmed on the ground that the petitioner failed to show which distributors made the adjustments. Petition, pp. 21a-22a. In the context in which the oral offer was made,

the question of who made the adjustments was never at issue. Moreover, it is difficult to conceive of a way in which the offered evidence could be introduced without identifying who made the adjustments.[1] In this context, the Court of Appeals decision was arbitrary and simply designed to avoid the important evidentiary limitation argued so strenuously by the petitioner on appeal and in its Petition here.

Another example deals with petitioner's attempt to show it was required to offer excessive playing time to obtain product. The Court of Appeals concluded that because "the playing time for pictures having comparable national film rental varied considerably," no valid inferences of excessiveness or discrimination could be made. Petition, pp. 22a-24a. The petitioner argues, however, that where the pattern established over the total period is as striking as that shown in the Petition, pp. 18-20, the individual variations cancel out, and inferences are not only permissive, but obvious. The Court of Appeals itself made such an inference when it prefaced this discussion with the remark,

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[1] The court below found reasons for absolving Warner Bros., Columbia, and Paramount from alleged discrimination on this point because Viking never sought an adjustment from them. All the other distributors, however, would seem clearly implicated since Viking unsuccessfully sought adjustments from them. R. 298-308. The court's elimination of Twentieth Century Fox from the issue would seem less than candid since Fox Theater, which sought films exclusively from Twentieth Century Fox, received 13 adjustments. Finally, the special problem of Universal was dealt with in the Petition, p. 16-18; the purported offer of an adjustment was of questionable bona fides and did little to remedy the compound discrimination involved in block-booking and discriminatory guarantees. In any case, the offered adjustment was withdrawn and Universal brought suit for the full amounts due.

"generally the playing time was longer for those pictures with the higher earning power." [2]

The Court of Appeals went even further astray when it rejected the petitioner's evidence of discriminatory film rentals. It discounted the probative value of the comparisons offered on the ground that the petitioner included rental guarantees in the computation of its total film rental paid. Petition, pp. 24a-26a. Why the inclusion of guarantees should destroy the comparison, the court never explains. Guarantees are just as much film rental as any percentage payment. Moreover, they are themselves one of the primary examples of discrimination. As the Petition, p. 18, indicates, to get sufficient film product, petitioner had to offer guarantees on 14 of the 32 films it played, whereas Goldman offered only one on the 134 it played. If the Court of Appeals would not consider such evidence, it is little wonder it had difficulty finding discrimination.[3]

Even the respondents get nervous at this point. They suggest that the excessive terms the petitioner had to offer, such as the $106,000 guarantee on "Man in the Grey Flannel Suit," were due to admitted poor business judgment rather than an anti-trust violation. However, the very example the respondents choose betrays their argument. For the admitted poor busi-

[2] The Court of Appeals also concluded that the petitioner was never "required" to enter any bid but submitted them voluntarily. This would seem obvious since no one coerced the petitioner to enter bids. The petitioner's intended meaning has always been that under the existing market conditions, with the split system eliminating substantially all competitive forces, the petitioner had to make excessive commitments to obtain films.

[3] As a last resort, the Court of Appeals adds there was no evidence of a specific conspiracy to charge excessive rental terms. This point has already been dealt with in the Petition, pp. 27-28.

ness judgment in the above example actually accentuates the petitioner's position on discrimination. When Goldman made a mistake in business judgment, i.e., when a film failed to live up to expectation, he simply terminated the run short of the contract date and held out for an adjustment on the percentage film rental due. Viking, on the other hand, under the constant threat of a suit on the contract, was required both to play out the contract run and to pay the guarantee considerably in excess of the earned film rental. In other words, Goldman could always cut his losses under fair and reasonable licensing contracts, whereas Viking was locked into all its losses under discriminatory contracts. Finally, as a legal matter, the question of whether admittedly excessive terms were due to poor business judgment or were the result of discrimination attributable to the split system is clearly one for the jury—not the court.

When one finishes reading the Court of Appeals disposal of the evidentiary issues, it is difficult to conceive of any comparison the petitioner could fashion on the question of discrimination that would be considered probative Prior to the showing of a film, the court implies, the film's evaluation is such a matter of intuitive judgment and involves so many variables that no objective comparison can be made. And even though a national film rating becomes available after the fact, the court states it is based on hindsight and cannot approximate the evaluation process prior to showing. It would seem that only a signed and sealed conspiracy agreement would satisfy the court below. Yet considering the court's treatment of the Schwalberg agreement, even this surmise is in doubt. The petitioner would hazard to guess that on the basis of the Third Circuit s opinion, the industry has finally

been found where business conditions are so fluid and complicated that proof of an anti-trust violation is impossible.

5. The respondents accuse the petitioner of theorizing on hypothetical facts when arguing that, due to the split system, the respondent-exhibitors could conserve resources when Viking was out of the market and bid up prices when Viking entered the market. Although there is little concrete evidence of the respondent-exhibitors "conserving resources," this omission is itself a product of error by the courts below since they would not permit evidence on films in which Viking did not express an interest. By definition this excluded all evidence of industry pricing while Viking was out of the market. In spite of this erroneous evidentiary limitation, the petitioner contends that the overall results of the conspiracy described in the Petition indicate the success of the respondent-exhibitors' whipsaw bidding practices. As for excessive rental terms, their existence is shown beyond question in the Petition and in the just concluded discussion of the Court of Appeals findings.

6. The respondents argue that the petitioner may not attack the split system because it did not ask to participate in the system, and that, when invited to participate, refused. The mere statement of this proposition shows it to be absurd. It states in effect that before attacking a conspiracy in violation of the anti-trust laws, a plaintiff must first apply to become a co-conspirator and be rejected.[4]

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[4] The alleged invitation to Viking to join the split system came after the distributors received in July 1956, a letter from petitioner's counsel informing them that the present action was to be filed. R. 974-75.

7. The respondents revive here the finding of the trial court that there was no injury to the petitioner even though this question was not passed on by the Court of Appeals. A very similar issue was raised in *United States* v. *Griffith*, 334 U.S. 100, 109, a civil suit brought by the United States, where the District Court had found that there was no violation of the Sherman Act and that none of the appellee's competitors had been injured in any way. The Court reversed and held, *inter alia*, that the findings on injury below were inadequate since they were based on the erroneous assumption that there had been no unlawful use of buying power by the appellee. Similarly in this case, since the trial court erred in finding the split system lawful, its finding of no injury was based on an invalid premise and must be reconsidered after remand for a new trial.

8. The respondents point out that the petitioner had a higher national film rental average per picture than did the respondent-exhibitors. They therefore conclude that Viking obtained better product. This argument spells out only half of the relevant business equation. As was shown in the Petition, p. 18, the equation of business success is a function of both film quality and speed of turnover. A fast turnover of poor films may be as profitable as a slow turnover of good films. The facts shown in the Petition, pp. 19-20, show that Viking had such a slow turnover of pictures that the total national film rental for all its pictures during the 123 weeks in question was $45 million, whereas Goldman and Stanley Warner averaged about $72 million per theater and the Fox figure was $80 million.

9. The respondents argue that the Fox Theatre took no part in any splits in the Philadelphia market. This

much the petitioner concedes insofar as the word "split" is used technically to describe the preparation of lists dividing the films of a single distributor between two exhibitors. However, viewing the market as a whole, there can be little doubt that an understanding ran between Goldman, Stanley Warner, and Fox Theatre giving Fox exclusive hegemony over Twentieth Century films. Mr. Fabian's own description of the situation can hardly be improved upon:

> Well, we thought that as long as the Fox Theatre was playing exclusively Fox pictures there was no purpose in our trying to take Fox pictures away from them in any quantity, because they would then try to get other pictures in the market, and there would have been no gain or loss one way or the other. R. 87-88.

A professor of economics would be pleased with Mr. Fabian's comprehension of oligopolistic practices. When this understanding is added to the "splits" between Goldman and Stanley Warner, a division of the market or split system results which the petitioner claims is a *per se* violation of the Sherman Act.

In conclusion, the petitioner pleads guilty to respondents' charge that it is attempting to burden the Court with hearing and deciding this case. Petitioner respectfully prays that the attempt will be successful.

Respectfully submitted,

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OCTOBER, 1963.